12-10-2012

State v. Peterson Appellant's Reply Brief Dckt. 39783

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. THOMAS EDWARD PETERSON, Defendant-Appellant.	)	NOS. 39146, 39147 & 39783 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE

Nature of the Case

Thomas Peterson appeals in this case, asserting that the district court violated his due process rights by failing to maintain a record below, thus depriving him of an adequate record on appeal. He also contends that the two district courts presiding over the cases now on appeal abused their discretion when they revoked his probation and denied his I.C.R. 35 (*hereinafter*, Rule 35) motions for leniency.

The State responds to Mr. Peterson's due process claim with two arguments. First, it asserts that he has failed to demonstrate that the documents at issue (telephone records) were ever actually in the record. However, the transcripts and record in case number 39783 (*hereinafter*, the 2011 case) do demonstrate, based on the reasonable inferences that can be drawn from that record, that those documents were included in the record. For example, the record from the 2011 case indicates that the telephone records were admitted as State's Exhibit 4 at the preliminary hearing (a specific discussion of these facts is provided in this Reply), and based on the district court's own comments, were reviewed and considered in aggravation by the district court when it sentenced Mr. Peterson. The record also reveals that those documents were not maintained in the district court's file and are not available for appellate review. As such, there was a violation of Mr. Peterson's due process rights.

The State's second argument is that Mr. Peterson should not be afforded relief because he did not demonstrate actual prejudice. First, based on the presumptions established in Idaho law, Mr. Peterson has actually been prejudiced by the disappearance of those documents from the court records. He is unable to challenge

the district court's characterization of those records or attack its reliance on them because the missing records are presumed to support the district court's actions. Second, Idaho law is clear that, when the district court fails to maintain the integrity of its record, and in so doing, deprives the defendant-appellant of an adequate record on appeal, the defendant-appellant need not demonstrate actual prejudice; the mere chance of prejudice is a sufficient basis upon which relief will be granted because that error has deprived the appellate process of the necessary fundamental fairness required by due process. Therefore, Mr. Peterson should be afforded the appropriate relief for the violation of his due process rights.

Because neither of the State's arguments withstands scrutiny, they should be rejected, and this Court should afford Mr. Peterson the appropriate remedy for the violation of his constitutional rights. The State's responses to Mr. Peterson's other arguments are unremarkable and no reply is provided herein; rather, Mr. Peterson simply refers this Court back to his Appellant's Brief.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Peterson's Appellant's Brief. With one exception, they need not be repeated in this Reply Brief. The statement of facts and course of proceedings from the Appellant's Brief are otherwise incorporated herein by reference thereto.

The necessary clarification deals with the evidence admitted into the district court's record during the preliminary hearing in the 2011 case.[1] (*See* R., Vol.2,

[1] A transcript of the preliminary hearing was not ordered by the district court. (*See generally* R., Vol.2.)

pp.20-23.) The minutes of that hearing reflect that, while questioning Tonya Newberry, the witness testified that officers secured a search warrant for Mr. Peterson's telephone records. (R., Vol.2, p.22 (at time stamp 14:24:49).) At that point, the State sought to admit a document identified as "States 4." (R., Vol.2, p.22.) Defense counsel requested a continuance because "[t]here is hundreds of phone numbers in this exhibit." (R., Vol.2, p.22.) The State responded, "[t]his isn't an unfair surprise. It's in the detectives report." (R., Vol.2, p.22.) Ultimately, State's Exhibit 4 was admitted into the record. (R., Vol.2, p.22 (at time stamp 14:36:59).)

ISSUES

1. Whether the district court violated Mr. Peterson's state and federal constitutional rights to due process by failing to maintain an accurate copy of the record in his case.

2. Whether the district court abused its discretion by revoking Mr. Peterson's probation in Docket Numbers 39146 and 39147, or by not reducing his sentences *sua sponte* pursuant to Rule 35.

3. Whether either or both of the district courts abused their discretion when they denied Mr. Peterson's Rule 35 motions.

ARGUMENT

I.

The District Court Violated Mr. Peterson's State And Federal Constitutional Rights To Due Process By Failing To Maintain An Accurate Copy Of The Record In His Case

A. Introduction

Contrary to the State's contentions, the record does indicate that the telephone records at issue in this case were in the district courts' files, and thus, their absence from the record constitutes a violation of Mr. Peterson's constitutional right to due process. Mr. Peterson argues that the district court's statements are not ambiguous in that regard, that it was actually considering the telephone records themselves, not just a summary. To support that contention, he points out that the documents now missing were likely what the State placed in evidence at the preliminary hearing in the 2011 case, identified as State's Exhibit 4. The inference is that, since there was no indication that those exhibits were returned to the parties, they remained in the record. When combined with the district court's statements at sentencing, that strongly indicates that, not only did the records remain in the file, they were reviewed by the district court when it imposed Mr. Peterson's sentence in that case.

The State only other contention in regard to the violation of Mr. Peterson's constitutional rights is that he failed to show actual prejudice from the absence from the record of evidence upon which the district court relied in aggravation. First, there is prejudice because of the presumptions in Idaho law in regard to appellate records. Because of those presumptions, Mr. Peterson is deprived of any challenges to the district court's reliance on the facts contained in that record (such as those based on

whether Ms. Giannini was instigating the contacts) because the missing records are presumed to support the district court's conclusions. Additionally, there is a recognized requirement that the State provide a fundamentally fair proceeding in criminal prosecutions and such a breakdown of established procedures as occurred in this case (losing exhibits from the file) deprives the proceedings of that necessary fairness, thus prejudicing Mr. Peterson. In such cases, the defendant-appellant need only demonstrate that there is a chance of prejudice, not actual prejudice. Therefore, the deprivation of due process necessitates a remedy on appeal, specifically a new sentencing and disposition hearing before a new judge.

B. By Not Preserving A Sufficient Record For Appeal, The District Court Violated Mr. Peterson's Due Process Rights

It is well recognized that, in order to provide a defendant-appellant with due process, the State must afford him a sufficient appellate record. *Draper v. Washington*, 372 U.S. 487, 498 (1963); *see Griffin v. Illinois*, 351 U.S. 12, 19 (1956). A sufficient record is one that allows for an adequate review of the proceedings below for errors. *See State v. Morgan*, ___ P.3d ___, Docket No. 39057, at 2 (Ct. App. 2012) (quoting *State v. Strand*, 137 Idaho 457, 462 (2002)), *petition for rev. denied.* The Idaho Supreme Court has consistently held that, when the inadequate appellate record is caused by the district court's failure to maintain an adequate record below, that violates the defendant-appellant's due process rights by depriving the proceedings of the necessary fundamental fairness. *See, e.g., Ebersole v. State*, 91 Idaho 630, 636 (1967); *State v. Martinez*, 92 Idaho 148, 149-50 (1968); *State v. Zielinski*, 119 Idaho 316, 318 (1991).

The reason such a failure constitutes a due a process violation is, "where pertinent portions of the record are missing, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999) (citation omitted). As a result of the *Coma* presumption, where documents upon which a sentencing determination was partially premised are not maintained in the file, the defendant-appellant is prevented from challenging that determination as error. *See id.* Even without the presumption, the fact that this information was not maintained in the record still prejudiced Mr. Peterson, as he was not able to review documents upon which the district court relied. (*See* App. Br., at 18-19.) For example, those documents may have contained mitigating evidence that could not be presented, regardless of the presumption in Idaho. Therefore, in order to have an adequate review of that decision to challenge errors therein, all such documents need to be maintained in the record, or else the defendant-appellant is deprived of his constitutional right to due process. *See, e.g., Draper*, 372 U.S. at 498; *Griffin*, 351 U.S. at 19; *Martinez*, 92 Idaho at 149-50; *Ebersole*, 91 Idaho at 636.

1. Based On The Information In The Record And The Reasonable Inferences Derived Therefrom, The Telephone Records Themselves Were In The District Court's Files

In this case, there are several indications that the telephone records at issue were admitted into the district court's record, the current absence of which constitutes a due process violation. First, there is the admission of State's Exhibit 4 at the preliminary hearing in the 2011 case. Defense counsel initially requested a continuance in light of that exhibit being proffered because "[t]here is hundreds of phone numbers in this exhibit." (R., Vol.2, p.22.) The State responded, "[t]his isn't an unfair surprise. It's in

the detectives report." (*See* R., Vol.2, p.22.) These two representations indicate that the attorneys were not referring to a summary of the records in a police report (*compare* Resp. Br. at 9-11), but rather to the actual document listing out the telephonic contacts, which was identified as State's Exhibit 4. (*See* R., Vol.2, p.22.) State's Exhibit 4 was admitted into the record. (R., Vol.2, p.22.)

As such, the district court's comments at the sentencing hearing indicate that it was reviewing the records collectively identified as State's Exhibit 4, as opposed to the summary of those records in the police report:

> And in the course of that investigation, according to the police report materials, they obtained a search warrant for the phone records from your victim. *Those phone records show* that between June of 2010 and January of 2011, they were able to document some 1,368 calls from you to the victim, in violation of your no contact order. *Those phone records also indicate* that on that same date -- between those same dates, they were able to document 1,899 text messages between you and the victim of the no contact order. Those materials are within the presentence materials that I've reviewed, sir.

(Tr., Vol.5, p.32, Ls.3-14 (emphasis added).) Its comments were similar to those of the attorneys when they were discussing State's Exhibit 4. The discussion started off with the police report indicating that officers secured a search warrant. (*Compare* Tr., Vol.5, p.32, Ls.3-5 *with* R., Vol.2, p.22.) The focus of the discussion then switched to "those phone records" and what they actually showed. (*Compare* Tr., Vol.5, p.32, Ls.6-14 *with* R., Vol.2, p.22.) As such, the record indicates that the district court had the telephone records, which it considered when it imposed Mr. Peterson's sentence in the 2011 case.

When the district court subsequently discussed these records at the sentencing hearing in the 2011 case, it described them as being included in the PSI materials. (Tr., Vol.5, p.32, Ls.10-14.) Regardless of whether those documents were actually

attached to the PSI, or in the record on their own and mistakenly presumed to be included with the PSI, or whether they appeared in two different parts of the record, the problem is that the documents were in the 2011 case record, but are no longer there. That failure to maintain the district court's record constitutes a violation of Mr. Peterson's due process rights in that case. *See, e.g., Martinez*, 92 Idaho at 149-50; *Ebersole*, 91 Idaho at 636.

However, based on the district courts' comments, copies of those phone records were attached to the PSI[2]: "according to the police reports, they obtained a search warrant for the phone records of your victim. Those phone records show . . . . Those phone records also indicated that . . . . Those materials are within the presentence materials that I've reviewed, sir." (Tr., Vol.5, p.32, Ls.4-14.) Like the presentation of State's Exhibit 4, the district court was reviewing the police records in regard to their search procedure and to the records themselves in regard to their contents. (*Compare* Tr., Vol.5, p.32, Ls.4-6 *with* R., Vol.2, p.22.) Therefore, the record sufficiently indicates that they were part of the PSI, and therefore, both district courts had the telephone records, considered them, and lost them. (*See* App. Br., p.12 n.18.) As such, both district courts deprived Mr. Peterson of his due process rights by depriving him of an adequate record for appellate review. *See, e.g., Martinez*, 92 Idaho at 149-50; *Ebersole*, 91 Idaho at 636.

[2] As a result, the record indicates those records were considered by both district courts. (*See* App. Br., pp.12 n.18, 17 n.20.)

2. Mr. Peterson Has Made A Sufficient Showing Regarding Prejudice To Entitle Him To Relief For The Violation Of His Constitutional Right To Due Process

First, Mr. Peterson was actually prejudiced based on the absence of the telephone records. That prejudice is revealed by the district court's own comments at sentencing in the 2011 case: "Those phone records show that between June of 2010 and January of 2011, they were able to document some 1,368 phone calls *from you to the victim*, in violation of your no contact order." (Tr., Vol.5, p.32, Ls.6-9 (emphasis added).) This indicates that, not only was the district court able to review the records themselves, but was using it in aggravation, or at least to negate Mr. Peterson's contention that Ms. Giannini had been initiating many of the contacts. (*See, e.g.,* PSI, Vol.2, p.5.) Part of Mr. Peterson's claim on appeal is that the sentence imposed is excessive because it was Ms. Giannini, not Mr. Peterson who was initiating the contact, which was prohibited by the NCO. (*See, e.g.,* App. Br., pp.22-23.) However, given the presumption from *Coma*, 133 Idaho at 34, those phone records will be presumed to support the district court's assertion, which Mr. Peterson cannot disprove without having those telephone records augmented into his appellate record. As a result, he has been deprived of an adequate appellate record in violation of his constitutional rights and prejudiced by that deprivation. *See Draper*, 372 U.S. at 498; *Griffin*, 351 U.S. at 19; *Morgan*, ___ P.3d ___, at 2.

Second, even if this Court finds no actual prejudice, the need to show actual prejudice in such situations is not as critical as the State contends. The State argues that because the failure to provide an adequate appellate record does not always violate the due process protections, actual prejudice must be shown, and in the absence

thereof, Mr. Peterson's claims on appeal should be rejected. (Resp. Br., at pp.9-13 (citing *State v. Polson*, 92 Idaho 615, 620-21 (1968); *State v. Wright*, 97 Idaho 229, 231-33 (1975); *State v. Lovelace*, 140 Idaho 53, 65 (2003); *State v. Cheatham*, 139 Idaho 413, 415 (Ct. App. 2003)).) Most of the cases relied upon by the State addressed situations where a hearing below was not recorded or the defendant-appellant was seeking to augment the appellate record with additional transcripts,[3] and it was in regard to those specific claims of due process violations that the defendant must show actual prejudice. *See, e.g., Wright*, 97 Idaho at 231; *Cheatham*, 139 Idaho at 415; *Lovelace*, 140 Idaho at 65. The remaining case (*Polson*) dealt with a defendant's challenge in regard to the publicity of the defendant's trial, and his unproved allegation that the publicity had deprived him of due process. *Polson*, 92 Idaho at 621. As such, those cases are distinguishable from the situation in this case, which is more akin to that in *Walters*. *Compare Walters*, 120 Idaho at 51.

Furthermore, while "error in the abstract does not ***necessarily*** rise to the level of constitutional dimension," *Lovelace*, 140 Idaho at 65 (emphasis added), the Idaho Supreme Court has consistently held that, when the inadequate appellate record is caused by the district court's failure to maintain an adequate record below, abstract error *does* rise to the constitutional dimension. *See, e.g., Martinez*, 92 Idaho at 149-50; *Ebersole*, 91 Idaho at 636; *Walters*, 120 Idaho at 51; *Zielinski*, 119 Idaho at 318. For example, the Idaho Supreme Court has clearly held that, where a sufficient record was unavailable, "but had a record been available it *might* have substantiated the

[3] As opposed to the district court's failure to preserve the evidence admitted to its file and upon which it relied during the case proceedings. *See, e.g., State v. Walters*, 120 Idaho 46, 51 (1990).

defendant's allegation that there was prejudicial error in those proceedings," the judgment of conviction based on the missing portions of the record cannot stand. *Walters*, 120 Idaho at 51 (emphasis added). According to *Walters*, the defendant-appellant is entitled to relief *if there is only a chance* that there was error; he need not show *actual* prejudice. *See id.*

The reason the defendant need not show actual prejudice to succeed on a constitutional claim in these situations is that the State is required to provide a fundamentally fair process. *See, e.g., Lassiter v. Dep't of Social Services of Durham County, North Carolina*, 452 U.S. 18, 24-25 (1981); *State v. Lewis*, 144 Idaho 64, 66-67 (2007); *State v. Green*, 149 Idaho 706, 708-09 (Ct. App. 2010). In the case where the defendant-appellant is deprived of an adequate record because the district court failed to preserve the evidence upon which it relied, "there is such a lack of fundamental fairness and deviation from established rules of procedure as to necessitate the conclusion that appellant has not been afforded the protection of the due process clauses of the Constitutions of the United States and this State." *Ebersole*, 91 Idaho at 636. The failure to preserve actual evidence in the record for appellate review so undermines the fundamental fairness of the process that the inadequate record itself effectively constitutes both the violation and the prejudice. *See, e.g., id.*; *Walters*, 120 Idaho at 51.

As a result, based on the reasonable inferences from the record, Mr. Peterson has shown that the district court had the telephone records, which it considered when sentencing Mr. Peterson in the 2011 case and revoking his probation in the 2008 and 2010 cases. He has also demonstrated the necessary prejudice, so as to be entitled to

relief for the district court's error. As such, this Court should grant that relief. *See, e.g., id.*; *Martinez*, 92 Idaho at 149-50.

II.

The District Court In Docket Numbers 39146 And 39147 Abused Its Discretion By Revoking Mr. Peterson's Probation, Or By Not Reducing His Sentences *Sua Sponte* Pursuant To Rule 35

Because the State's argument concerning the district court's abuse of discretion when it revoked Mr. Peterson's probation is not remarkable, no further reply is necessary. Accordingly, Mr. Peterson simply refers the Court back to pages 19-25 of his Appellant's Brief.

III.

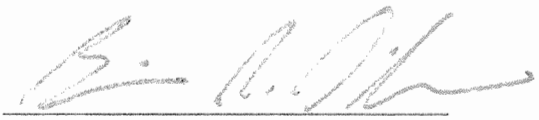
Either Or Both Of The District Courts Abused Their Discretion When They Denied Mr. Peterson's Rule 35 Motions

Because the State's argument concerning the district courts' abuse of discretion when they denied Mr. Peterson's Rule 35 motions is not remarkable, no further reply is necessary. Accordingly, Mr. Peterson simply refers the Court back to pages 26-29 of his Appellant's Brief.

CONCLUSION

Mr. Peterson respectfully requests that his case be remanded to the district court for a new sentencing hearing before a new judge. Alternatively, he requests that this Court reduce his sentence as it deems appropriate.

DATED this 10th day of December, 2012.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of December, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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